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11 **IN THE UNITED STATES DISTRICT COURT**  
12 **FOR THE WESTERN DISTRICT OF WASHINGTON**

12 WASHINGTON TOXICS COALITION,  
13 NORTHWEST COALITION FOR  
14 ALTERNATIVES TO PESTICIDES,  
15 PACIFIC COAST FEDERATION OF  
16 FISHERMEN'S ASSOCIATIONS, and  
17 INSTITUTE FOR FISHERIES RESOURCES,

Plaintiffs,

vs.

19 ENVIRONMENTAL PROTECTION AGENCY,  
20 and MIKE LEAVITT

Defendants.

vs.

23 AMERICAN CROP PROTECTION ASSOC. et al

Intervenor-Defendants

)  
)  
) Case No. C01-0132  
)  
) **FEDERAL DEFENDANTS'**  
) **OPPOSITION TO PLAINTIFFS'**  
) **MOTION FOR FURTHER**  
) **ACTION BY DEFENDANT**

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28 FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS'  
MOTION FOR FURTHER ACTION BY DEFENDANT

Case No. C01-0132

Environment & Natural Resources Div.  
U.S. Department of Justice  
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1 The plaintiffs ask this Court to compel further, additional mandatory injunctive relief,  
 2 where EPA has fully complied with the mandatory injunctive relief already ordered by the  
 3 Court's January 22, 2004 order (the "Order"), and without any allegations that EPA has violated  
 4 or breached that Order. The plaintiffs seek this now third bite at the apple to compel new action  
 5 from EPA, despite the extensive opportunities provided by the Court to the plaintiffs to craft the  
 6 original mandatory injunctive relief ultimately ordered by this Court. EPA has undertaken  
 7 efforts, beyond those even ordered by the Court, to both communicate and explain the Court's  
 8 order to the public and other entities affected by that order. Without some allegation that EPA  
 9 has failed to abide by the terms of the Order or is otherwise in breach of the order such that  
 10 additional injunctive relief is necessary to remedy that breach, this Court should not afford the  
 11 plaintiffs' an opportunity for post hoc modification of the terms of the extensively argued prior  
 12 order.

13 Additionally, the relief sought by the plaintiffs does not address the alleged problem for  
 14 which they seek redress: isolated retailers allegedly failing to make the point of sale notice  
 15 available. Furthermore, the relief that the plaintiffs now seek is either redundant, impractical,  
 16 and/or beyond the EPA's regulatory jurisdiction. Accordingly, the Court should order no further  
 17 mandatory injunctive relief.

### 18 ARGUMENT

#### 19 **I. The Plaintiffs' Motion Fails To Address or Meet Any Applicable Standard For the** 20 **Review and Modification of a Final Prior Court Order, and Therefore Should Be** 21 **Denied.**

22 The plaintiffs ask this Court to enter a new order imposing new and additional mandatory  
 23 relief when they have neither alleged, nor could they succeed in arguing, that any legal standard  
 24 has been met entitling them to this relief. Plaintiffs were afforded every opportunity by the  
 25 Court to tender, negotiate, and argue for the terms of the order ultimately adopted by the Court,  
 26 over EPA objection. Now they seek to re-make the terms of the Order without either  
 27 demonstrating that EPA has violated the Order, thereby making an additional judicial remedy is

1 necessary, or that they are entitled to relief from that order pursuant to Fed. R. Civ. P. 60(b).<sup>1/</sup> As  
 2 a result, plaintiffs' request should be denied.

3 **A. Plaintiffs Can Not Justify Compelling Further Actions Because EPA Did Not**  
 4 **Violate the Order**

5 The plaintiffs do not allege that the EPA has breached or violated the terms of the Court's  
 6 Order. To the extent, however, that their arguments are construed as allegations of breach or  
 7 they modify their pleadings to assert breach, before plaintiffs may seek relief to enforce the  
 8 Order, plaintiff must demonstrate by clear and convincing evidence that EPA violated a specific  
 9 and definite provision of the Order. This is particularly where the plaintiff seeks to impose new  
 10 obligations or sanctions to remedy some non-compliance. *In Re Bennett*, 298 F.3d 1059, 1069  
 11 (9<sup>th</sup> Cir. 2002). Here the plaintiffs do not even attempt to satisfy this standard. Indeed, EPA has  
 12 diligently complied with every aspect of the Court's order, and has in many instances gone  
 13 beyond what was required in that Order. Therefore, the plaintiffs can not rely on allegations of  
 14 breach to justify the need for further judicial orders.

15 **B. In Light of The Appeal Filed in This Case, The District Court May Be**  
 16 **Without Jurisdiction to Impose Different Mandatory Injunctive Relief Upon**  
 17 **Defendants.**

18 Absent breach, the only other legal remedy available to a plaintiff to undo a judicial order  
 19 and impose new relief for the same prior violations is pursuant to Rule 60(b). However, it is  
 20 well settled that generally the filing of a notice of appeal divests a district court of jurisdiction  
 21 over those aspects of the case involved in the appeal. *Natural Resources Defense Council v.*  
 22 *Southwest Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001); *Griggs v. Provident Consumer*  
 23 *Discount Co.*, 459 U.S. 56, 58 (1982) ("[t]he filing of a notice of appeal is an event of  
 24 jurisdictional significance – it confers jurisdiction on the Court of Appeals and divests the

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25 <sup>1/</sup> Generally, "where litigants have once battled for the court's decision, they should neither  
 26 be required, nor without good reason permitted, to battle for it again," *Zdanok v. Glidden*, 327  
 27 F.2d 944, 953(2nd Cir. 1964), and it is generally recognized that once a court has decided an  
 28 issue, there is a need for litigation to come to an end. *Disimone v. Browner*, 121 F.3d 1262, 1267  
 (9<sup>th</sup> Cir. 1999).

1 district court of its control over those aspects of the case involved in the appeal"). Consistent  
 2 with this rule, the Ninth Circuit has noted that "once a notice of appeal is filed jurisdiction is  
 3 vested in the Court of Appeals, and the trial court therefore has no power to modify its judgment  
 4 in the case or proceed further except by leave of the Court of Appeals." *Visioneering*  
 5 *Construction & Dev. Co. v. United States Fidelity & Guar.*, 661 F.2d 119, 124 n.6 (9th Cir.  
 6 1981) (emphasis added); *City of Los Angeles, Harbor Division v. Santa Monica Baykeeper*, 254  
 7 F.3d 882, 885-86 (9th Cir. 2001).

8 Here, the Court's injunctive order has been appealed and the merits of the Order are  
 9 squarely before the Ninth Circuit. Accordingly, this Court is without jurisdiction to grant  
 10 additional or new relief as requested by the Plaintiffs. Moreover, while it is true that the Ninth  
 11 Circuit has recognized exceptions to the above general divestiture rule for among other things,  
 12 retaining jurisdiction to supervise the status quo during pendency of the appeal, *Stein v. Wood*,  
 13 127 F.3d 1187, 1189 (9th Cir. 1997), that exception is not applicable here. The relief sought by  
 14 the plaintiffs is not the maintenance of the status quo, or needed to enforce the Order. Rather,  
 15 the plaintiffs seek to impose new and additional burdens upon the defendants not previously  
 16 contemplated in the court's orders. As such, the Court lacks jurisdiction to award the plaintiffs  
 17 the relief they seek. *McClatchy Newspapers v. Central Valley Typographical Union No. 46*,  
 18 686 F.2d 731, 734-35 (9th Cir. 1982) (because "district court's judgment was not addressed to  
 19 maintenance of the status quo during the pendency of the appeal," but granted different relief  
 20 which "required a change from the status quo" and which was not done to "achieve the same  
 21 enforcement purpose" as the original order, the "amended judgment was rendered without  
 22 jurisdiction and must be vacated"); *Natural Resources Defense Council*, 242 F.3d at 1166  
 23 (district court may modify an injunction only in a manner intended "to preserve the status quo  
 24 during the pendency of an appeal," and it may not "adjudicate anew the merits of the case on  
 25 appeal" or "materially alter the status of the case on appeal"). Accordingly, the Court should  
 26 deny plaintiffs' motion.

**C. Plaintiffs Fail to Meet Any of the Standards for Rule 60(b) Relief**

Even if the Court retained jurisdiction to entertain Plaintiffs' requested relief, plaintiffs' motion should be denied. The plaintiffs have not even attempted to articulate the legal basis that allows them to seek "further action" as they do, or under which provision of Rule 60(b) they claim is applicable. In any event, the plaintiffs are unable to satisfy any of the six basis articulated in Rule 60(b) for relief. Only Rule 60(b)(2) (newly discovered evidence) or 60(b)(6) (other reason justifying relief) could even potentially apply in this instance,<sup>2/</sup> and the plaintiffs can not meet these requirements.

Relief under Rule 60(b)(2) is not available. Under Rule 60(b)(2), in order for evidence to be "newly discovered," it must have been in existence at the time judgment was entered, and not involve some later occurrence. *Gonzalez v. Gannett Satellite Information Network*, 903 F.Supp. 329, 332 (N.D. N.Y. 1995); *Corex Corp. v. United States*, 638 F.2d 119, 121 (9<sup>th</sup> Cir. 1981), *overruled by implication on other grounds*, *Gregorian v. Izvestia*, 871 F.2d 1515 (9<sup>th</sup> Cir. 1989). It is well settled that evidence is not "newly discovered" under Rule 60(b)(2) if it was in the moving party's possession prior to judgment or "could have been discovered with reasonable diligence." *Coastal Transfer Co. v. Toyota Motor Sales, USA*, 883 F.2d 208, 212 (9<sup>th</sup> Cir. 1987); *School Dist No. 1J v. ACands Inc.*, 5 F.3d 1255, 1263 (9<sup>th</sup> Cir. 1993) (where an argument is available to a party at the time of judgment, it may not be asserted later under a claim of new discovery). Here, the plaintiffs were free to advance their arguments and had sufficient facts before them at the time the parties argued the original order to assert that notice to retailers should be made in a certain fashion and contain certain information. Indeed, it was perfectly foreseeable that there would be some difficulty in getting every retail outlet on the entire west coast in Urban Areas to make the point of sale notification available. EPA specifically advised the plaintiffs and the Court prior to entry of the Order that under the approach being considered,

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<sup>2/</sup> Each of the other basis are wholly inapplicable to the plaintiffs' argument, and we do not address them here.

1 EPA could not ensure the conduct of retail outlets, and all that EPA could do was produce  
 2 material, provide that material, and it can request that the material be provided with and made  
 3 available with certain pesticides. *Federal Defendants' Objections to Plaintiffs' Proposed*  
 4 *Injunctive Order at 3-4*, Docket #219 . EPA explained that it has no ability or mechanism to  
 5 ensure that the purchaser actually receives the notification and that in the absence of taking  
 6 actions against individual pesticide registrations under FIFRA, EPA does not possess the  
 7 authority to require retailers to make point of sale notifications through any other means. *Id.*  
 8 There was ample notice to plaintiffs of these future potential difficulties, and plaintiffs were free  
 9 to argue for more particular notice requirements and substantive content at the time the order  
 10 was briefed and argued. The plaintiffs did not do so, and their failure to do so in the face of the  
 11 information available to them at the time is not excusable.

12 As for Rule 60(b)(6), relief is available only under "extraordinary circumstances."  
 13 *Ackerman v. United States*, 340 U.S. 193, 199 (1950); *In re Pacific Far East Lines*, 889 F.2d  
 14 242, 249-50 (9<sup>th</sup> Cir. 1989). A moving party must demonstrate that "both injury and  
 15 circumstance beyond its control prevented timely action to protect its interests." *United States v.*  
 16 *Alpine Land & Reservoir*, 984 F.2d 1047, 1049 (9<sup>th</sup> Cir. 1993). For the reasons discussed above,  
 17 the arguments advanced by plaintiffs fail to meet this standard.

18 **II. The EPA Has Fully Complied With and Even Exceeded the Order's Requirements,**  
 19 **and The Plaintiffs Do Not Allege Otherwise.**

20 If the Court determines to entertain the plaintiffs' motion even absent any evidence of  
 21 violation or breach, and absent any basis under Rule 60(b), the motion must still be denied. The  
 22 Court carefully explained the differing obligations it was placing upon EPA and the Intervenor  
 23 with respect to the point of sale notification. The Court directed EPA to create the notice and  
 24 notify retailers that they are to make the notice as directed in the Court's order. The intervenors  
 25 were to be the distributors of the notice to retailers (with whom EPA has no regulatory  
 26 relationship but with whom intervenors were more likely to have interactions), and EPA was to  
 27 be the distributor of the notice to state agencies and land grant coordinators (with whom EPA has

interactions as a regulator). Order at ¶ IV.B.

The Court's Order did not direct EPA to notify retailers through any specific method. In order to comply with the Court directive to notify retailers, the EPA had to find a way to notify retailers over the entire west coast, in the defined Urban Areas that fell within the definition of salmon supporting waters in the Order. However, EPA does not directly regulate retailers under FIFRA or any other authority, and has no list of who those retailers are, their addresses, and which retailers would fall within the geographic areas of "urban areas" and "salmon supporting waters" as defined in the Order. Faced with communicating with a large, undefined, multi-state, indeterminate, and potentially shifting<sup>3/</sup> mass audience, the EPA exercised its discretion in a reasonable fashion and published notice in the Federal Register. 69 Fed. Reg. at 1386 (March 24, 2004). That notice is entitled "Notice to Pesticide Retailers and State Agencies. . .", fully explains the Court's order as it pertains to the point of sale notifications, and was the best as well as most practical way for the EPA to communicate to this audience. *Id.* Federal Register publication is generally the prescribed method by which agencies are instructed to communicate to the public, and given the lack of other practical ways to do so in this instance, it was an entirely reasonable, efficient, and feasible means for EPA to comply with the Order.

EPA has also made extensive information available on its website about the Order. The EPA has listed all the Court's orders, implemented an interactive mapping system to help both retailers and the public geographically understand just what waters are "salmon supporting" under the Order, described the Court's orders in plain language, created a question and answer format to aid understanding, re-published the Federal Register notices so that web-enabled public has easy access, and lists the pesticides subject to the Order. See

<http://www.epa.gov/espp/wtc/index.html>. Aside from Federal Register notice publications,

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<sup>3/</sup> The audience is potentially shifting as will be explained later because as may effect determinations are made for certain ESUs or as consultations for certain ESUs are completed, the urban areas in the areas where those ESUs are may no longer be subject to the Court's order.



1 the EPA website is the usual and primary way in which the EPA communicates with the public,  
2 and such large groups as retailers on the west coast.<sup>4/</sup>

3 The plaintiffs complain that the Federal Register notice directs retailers and readers to the  
4 Intervenor's website in order to receive additional copies of the point of sale notice that was  
5 distributed by the intervenors. The plaintiffs imply some sinister motive on the part of EPA, but  
6 in the context of the differing obligations under the order, the EPA believed it made sense to  
7 have additional copies of the Order available from the publishing entity, the intervenors. Under  
8 the scheme set out by the order, retailers would have received their first copies of that notice  
9 from the intervenors, not the EPA, and would therefore naturally look to whoever sent the  
10 notices for additional copies, in this case, the intervenors. Accordingly, EPA believed it was  
11 reasonable and would be less confusing to refer retailers looking for additional copies of the  
12 notice to the intervenors' website. This was just one of numerous decisions EPA was forced to  
13 make in order to implement the Court's order, and it is inappropriate for plaintiffs to single out  
14 this particular decision as evidence of some failure by EPA.<sup>5/</sup> The plaintiffs also neglect to  
15 point out to the Court that the Federal Register notice not only refers readers to the intervenors'  
16 website, but that it also identifies the EPA website as a source for additional information, and  
17 directs readers to the EPA website as well. 69 Fed. Reg. at 13837-38. In fact, EPA's website  
18 information appears over six times in the notice, and specifically identifies EPA, not the  
19 intervenors, as the source for further informational contact. *Id.* The plaintiffs' arguments that a

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21 <sup>4/</sup> At the status conference held on June 29, 2004, the Court directed EPA to advise the  
22 Court in any response to plaintiffs' motion what the usual manner to communicate to a group  
23 such as these retailers would take. As discussed in this opposition, given the nature of the group  
24 with whom EPA needed to communicate (i.e. an unknown number or unidentified, unregulated  
25 retailers), the Federal Register and EPA's website would be the usual means EPA would employ  
26 to inform such individuals of its actions.

27 <sup>5/</sup> We note that EPA has made a copy of the point of sale notice available on its own web-  
28 site. Exhibit C. This is one of the relief measures the plaintiffs request, but has already been  
undertaken by EPA on its own accord.



single reference to the intervenors website somehow renders this notice infirm or reflects some bad intent by EPA's are simply without merit.

EPA's actions have fully satisfied both the letter and the spirit of the Court's order. The plaintiffs do not allege any violation of the Court's order, but rather engage in a hyper-critical assessment of the agency's activities in an effort to convince this Court to impose new, additional obligations of plaintiffs' choosing upon EPA. In the end, it is clear that the Plaintiffs are not seeking to enforce the Court's order, but rather are attempting to substitute their judgement for that of the EPA in attempting to dictate and control, for example, the method used by EPA to provide notice, the content and text of that notice, and the content of EPA's website.<sup>6/</sup> The Court should not be further drawn down this road of managing the day-to-day exercise of EPA's administration and exercise of its discretion in implementing the court's legal mandates.

### **III. The Relief That the Plaintiffs Now Seek Is Either Redundant, Impractical, And/or Beyond the EPA's Regulatory Jurisdiction**

The plaintiffs seek four enumerated items of relief, ask the Court to further direct the substance of additional communications, and ask the Court to direct EPA to consult with plaintiffs for all future actions related to the Order. Plaintiffs' Motion at 9-10. The Court should not order this new mandatory injunctive relief.

The plaintiffs' basis for compelling additional action by EPA appears to rest on the basis that a limited sampling by plaintiffs of some retailers in the area revealed that the retailers had either failed to or refused to make the point of sale notification available. Significantly, this is

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<sup>6/</sup> Since the entry of the Court's order, there is little about which the plaintiffs have not complained to EPA and for which they have attempted to substitute their judgment for that of EPA. In addition to the items contained in the motion, plaintiffs' counsel's letter of April 9, 2004 (plaintiffs' exhibit 8) complains about such minutia as the font type used, the wording of the Intervenor's notice, the inclusion in the point of sale notice of a truthful statement that there is a court order directing notice to urban users, and finally complaining that plaintiffs are not being consulted and included in EPA's ongoing agency actions. Plaintiffs also had previously complained about the choice of language used by EPA in another notice, despite that language tracking the Court's order verbatim, and demanded a more full exposition from EPA. (See Defendant's Exhibit A and B).

1 not a failure by EPA, and as EPA has explained to the plaintiffs and the Court on this aspect of  
 2 the injunctive relief, unless EPA initiates cancellation actions under FIFRA to compel  
 3 amendments to pesticide product registrations and labeling, EPA has neither the jurisdiction nor  
 4 regulatory authority to force retailers to actually make the point of sale notification.<sup>7/</sup> A failure  
 5 or refusal by retailers over which EPA has no control should not give rise to new additional  
 6 burdens upon EPA, particularly where EPA advised prior to the Order's entry that such problems  
 7 existed in the approach advocated by the plaintiffs. Even with the additional remedies sought by  
 8 plaintiffs, such limited instances of retailers failing to make the point of sale notification could  
 9 continue.<sup>8/</sup>

10 **A. The Court Should Not Grant The Plaintiffs the First Enumerated Request**  
 11 **For Relief That Seeks a Second Notice By an EPA Mailing to Retailers**

12 Specifically, plaintiffs first ask the Court to order EPA to contact retail establishments by  
 13 mail in the Urban Areas affected by the Order. However, as explained above, EPA does not

14 \_\_\_\_\_  
 15 <sup>7/</sup> In its objections to the plaintiffs proposed order, the EPA explained that:

16 "EPA can not "ensure" the conduct of retail outlets. EPA can produce material,  
 17 it can provide that material, and it can request that the material be provided with  
 18 and made available with certain products. However, EPA has no ability or  
 19 mechanism to "ensure," as the plaintiffs seek, that the purchaser actually receives  
 20 it. . . . [I]t is impossible for EPA to comply with the Court's order as plaintiffs  
 21 have drafted it. Further, EPA's ability to legally compel pesticide registrants and  
 22 retailers to distribute the materials is limited to its authority under FIFRA. . . EPA  
 23 does not possess the authority to require point of sale notifications through any  
 24 other process irrespective of whether such materials may or may not constitute  
 25 labeling under FIFRA §2(p)."

26 Federal Defendants' Objections to Plaintiffs' Proposed Injunctive Order at 3-4

27 <sup>8/</sup> We note that plaintiffs limited observations in their declarations are hardly a statistically  
 28 valid sampling, and also do not include any surveys of in how many retail establishments the  
 postings were actually made. In addition, simply because a point of sale notice was not  
 observed does not necessarily prove that retailer failed to receive it or was confused about it. A  
 retailer could have received it and understood it, but through inadvertence or neglect failed to  
 post it. Redundant notice, therefore, would not necessarily address the alleged problem observed  
 by the plaintiffs.

1 directly regulate retail outlets, and therefore does not possess such a mailing list. Second, such a  
 2 mailing list would cover the entire west coast of the United States, and would further need to be  
 3 cross-referenced with the areas that are both “urban” as defined by the order, and those that fall  
 4 into the geographic area of “salmon supporting waters.” There is no practical way to create such  
 5 a cross-referencing, other than by hand, and cross referencing every retail outlet on the west  
 6 coast with the urban areas in a salmon ESU is almost unimaginable. Therefore, when EPA was  
 7 confronted with a large, undefined, multi-state, indeterminate, and potentially shifting mass  
 8 audience, the EPA exercised its discretion in a reasonable fashion and published notice in the  
 9 Federal Register.

10 Third, it is firmly established as a matter of law that where an agency is tasked with  
 11 giving notice, publication of notice in the Federal Register is deemed to satisfy any notice  
 12 requirement. *See*, 44 U.S.C. §§ 1505, 1507 (when an agency is required by law to give notice to  
 13 the public, publication in the Federal Register is deemed legally sufficient to give notice to a  
 14 person subject to or affected by the notice); *Lyng v. Payne*, 106 S.Ct. 2333, 2343 (1986)  
 15 (publication in Federal Register satisfies due process concerns); *Friends of Sierra Railroad v.*  
 16 *Interstate Commerce Comm.*, 881 F.2d 663, 667-68 (9<sup>th</sup> Cir. 1989) (Federal Register notice  
 17 sufficient to appraise public of abandonment of real estate); *United States v. Wilhoit*, 920 F.2d 9,  
 18 10 (9<sup>th</sup> Cir. 1990) (Federal Register notice sufficient to put public on notice of criminal penalty);  
 19 *Covelo Indian Community v. FERC*, 896 F.2d 581, (9<sup>th</sup> Cir. 1990) (Constitutional due process  
 20 satisfied by notice in Federal Register, even if it did not provide actual notice); *Jones v. United*  
 21 *States*, 121 F.3d 1327, 1330 (9<sup>th</sup> Cir. 1997) (publication in Federal Register is deemed legally  
 22 sufficient to notify public and satisfy due process requirement). If Federal Register notice is  
 23 sufficient to put the public on notice of criminal behavior, agency rules regulating the public, and  
 24 is sufficient notice for safeguarding Constitutional rights, it is a reasonable means of providing  
 25 notice to retailers in these circumstances. The notice was directed to retailers, provided  
 26 information to help retailers determine where the affected areas were, advised those retailers of  
 27

1 the Court's order regarding the point of sale notifications and that retailers in urban areas are to  
 2 make the point of sale notification, listed the pesticides subject to the Order, and directed  
 3 retailers to EPA's website for further information. 69 Fed. Reg. at 13836-38.<sup>2/</sup>

4 Since notice by Federal Register publication is firmly sufficient under the law, since EPA  
 5 has no way to reasonably create or carry out the kind of mailing sought by the plaintiffs, and  
 6 since such a mailing would be redundant, hugely impractical, and prohibitively expensive to  
 7 carry out, the Court should not order this new relief.<sup>10/</sup> We note that while the intervenors have  
 8 conducted a mailing in an attempt to satisfy their obligations under the order, the EPA is not  
 9 privy to the mailing list generated by the intervenors that they used for distribution of the notice,  
 10 nor did EPA participate in the methodology used to create that list. Even if EPA had access to  
 11 such a mailing list, there is no reason to believe that a duplicate mailing by EPA would result in  
 12 any greater dissemination of the point of sale notification. As explained, in the absence of FIRA  
 13 regulation of the pesticide product itself, EPA has no authority or jurisdiction to force retail

14 \_\_\_\_\_  
 15 <sup>2/</sup> For example, after listing the seven pesticides, EPA states "EPA is hereby notifying  
 16 retailers of lawn and garden pesticides in urban areas of California, Oregon and Washington  
 17 through which "salmon supporting waters" pass that they are to make the point of sale  
 18 notification whenever products containing the seven active ingredients are sold." 69 Fed. Reg. at  
 19 13837-38.

20 <sup>10/</sup> The plaintiffs point to EPA's mailings to state agencies and land grant coordinators as  
 21 evidence that a mailing to retailers is reasonable and preferable. The plaintiffs are mistaken.  
 22 First, unlike for retailers, the order directed EPA not only to provide notice but also to produce  
 23 copies of the point of sale notification to these entities, and therefore a Federal Register notice  
 24 alone would not seem to have satisfied the Court's order. Therefore, EPA was required by the  
 25 order to make this mailing and did not do so because of some preference for or belief that  
 26 mailing was a better form of communication. Second, the state agencies and land grant  
 27 coordinators are a much, much smaller group, and a group that EPA is able to readily identify  
 28 addresses, particularly since these are entities with which EPA has more regular contact, unlike  
 29 retailers. Finally, because there are only a few state agencies for each of the three states, and  
 30 because they have state-wide jurisdiction, there was no need to determine an overlay of both  
 31 Urban Areas and Salmon Waters to determine to whom to send mailings: once a state agency  
 32 was identified it received a mailing. This is unlike the requirements for individual retailers for  
 33 whom the order only applies if they are in an Urban Area in the area of Salmon Supporting  
 34 Waters for a particular ESU of salmon.

outlets make the point of sale notification or to sanction them if they fail to do so. Such a duplicate mailing to those who have already received the point of sale notification as originally directed by the Court would be simply a waste of resources.

**B. The Court Should Not Grant The Plaintiffs the Second Enumerated Request For Relief That Seeks a Second Notice by EPA to Registrants.**

The plaintiffs second enumerated relief request seeks to compel EPA to provide a second notice to registrants and those in privity with them of the Court's order and its requirements. EPA complied with this requirement in a February 17, 2004 Federal Register notice. 69 Fed. Reg. 7478 (Feb. 17, 2004). The plaintiffs complain that EPA's notice by Federal Register to registrants was ineffective to meet this requirement of the order and that therefore a direct mailing is required. The plaintiffs argue that publication of the Order's terms in the Federal Register is inadequate to notify pesticide registrants, but offer no argument or evidence to support this contention. It is naive at best to suggest that the manufactures and registrants of pesticides, which is a highly regulated industry, are unaware of the Federal Register and its function as the conduit for communication by federal regulatory entities such as the EPA. There is simply no reason to believe that this regulated community does not monitor the Federal Register and is unaware of EPA's publications, its website, and announcements in the Federal Register. Indeed, an industry trade association that represents most of the registrants was a party to this matter. Furthermore, as discussed above, notice in the Federal Register is deemed sufficient as a matter of law for those to whom it is directed. Therefore, mailing that which was already published to these entities is a waste of resources, and plaintiffs' motion should be denied.

**C. The Court Should Not Order The Remaining Relief Sought by Plaintiffs**

The plaintiffs third and fourth enumerated relief asks the Court to compel EPA to provide the point of sale notification on its website and an "easily accessible and clear description" of the point of sale notification requirements, to publish another Federal Register notice that directs retailers to the EPA website if they require additional copies of the notice. First, the point of sale

1 notification is already available on EPA's website, rendering moot this aspect of the plaintiffs'  
2 request. Exhibit C, <<http://www.epa.gov/oppfead1/endanger/wtc/pos.htm>> The basis for EPA  
3 originally not posting this notice to its site was explained above, and was a function of the  
4 structure of the Court's order and relative responsibilities of the parties in that order. While EPA  
5 has since added the point of sale notice to the website, its original approach was rational and  
6 neither arbitrary nor capricious.

7       Second, the point of sale notification requirements outlined in the Order speak for  
8 themselves, and EPA has both published this order and explained on its website and Federal  
9 Register Notice what the Court has ordered and where it applies. The information is already as  
10 easily accessible and clear as EPA can make it on its website. Third, and most significantly,  
11 there was never any requirement in the order for the defendants to make additional copies of the  
12 point of sale notification available in the first place. In an effort to better implement the Order  
13 and make sure distribution to retailers was effective, the Intervenor defendants advised EPA the  
14 point of sale notification would be available on its website, and the EPA included that  
15 information in its Federal Register notice about the order. To make sure no good deed goes  
16 unpunished, plaintiffs now are critical of these extra efforts, and seek to compel additional  
17 actions by EPA because the plaintiffs are unhappy with EPA's discretionary and voluntary  
18 agency actions implementing the Order. The Federal Register notice not only refers readers to  
19 the intervenors' website, but that it also identifies the EPA website as a source for additional  
20 information, and directs readers to the EPA website as well. 69 Fed. Reg. at 13836-37. EPA's  
21 website information appears over six times in the notice, and specifically identifies EPA as the  
22 source for further informational contact. 69 Fed. Reg. at 13836-38. Therefore, the Court  
23 should not direct EPA to make another Federal Register publication to identify a new source for  
24 copies, where there was never any requirement that additional copies be provided, and the  
25 original notice was reasonable as well as perfectly appropriate. Nor should the Court allow the  
26 plaintiffs to exercise editorial control over the content of information posted on EPA's website,  
27

1 particularly where posting on the website was never required by the original order.

2 The plaintiffs also ask the Court to specify the content of the new notices to be supplied  
3 by EPA and, for the first time in this litigation, seek to attempt to identify pesticide products,  
4 rather than active ingredients. First, in its notice to retailers, the EPA listed the seven active  
5 ingredients as they were identified in the Court's order as the active ingredients for which there  
6 may be point of sale notification requirements. 69 Fed. Reg. at 13837. All products must list  
7 their active ingredients on their labels (and generally on the front panel of the label, See 40  
8 C.F.R. § 156.10(g)), and therefore any product that contains one of these ingredients will be  
9 visibly and clearly labeled. The particular pesticide products on the market may well change  
10 over time, and sometimes names of a product may also change over time. But, the active  
11 ingredients subject to this Order will remain the same. Therefore, a notice that identified  
12 products as the plaintiffs for the first time now seek, rather than active ingredients, would  
13 constantly need to be updated to remain accurate. Such a constant updating and re-noticing  
14 would consume unnecessary resources and would become confusing to retailers. We also note  
15 that the notice refers the retailer to the EPA website to determine whether that retailer is in an  
16 Urban Area, and in which area of ESU of Salmonid that Urban Area is located. It also  
17 specifically instructs them to make the point of sale notice.<sup>11/</sup> It would be impossible to provide  
18 this information in a clear and meaningful way in a one-size-fits-all notice. Since the  
19 applicability of the point of sale notice is variable based upon these factors, the only way to have  
20 meaningful notice is to advise retailers in general of the requirements, and direct them to an area  
21 where they can ask specific questions or look at specific information to determine whether the  
22 orders' point of sale notice provisions apply in their area. The EPA carefully and thoughtfully  
23 considered the best way to make the most clear, effective, and efficient notice as possible. The

24 \_\_\_\_\_  
25 <sup>11/</sup> "EPA is hereby notifying retailers of lawn and garden pesticides in urban areas of  
26 California, Oregon and Washington through which "salmon supporting waters" pass that they are  
27 to make the point of sale notification whenever products containing the seven active ingredients  
28 are sold." 69 Fed. Reg. at 13837-38.



1 EPA acted reasonably in this regard, and has fully complied with the Court's order. The court  
2 should not order EPA to undertake new notices that identify products, rather than active  
3 ingredients.

4 **CONCLUSION**

5 The Court should deny the relief requested by the plaintiffs.

6  
7 Respectfully submitted,

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